

2011 WL 3145295 (Miss.) (Appellate Brief)
Supreme Court of Mississippi.

Vanessa DECKER a/k/a Vanessa Francis Decker a/k/a Vanessa Frances Decker a/k/a Fran, Appellant,
v.

STATE OF MISSISSIPPI, Appellee.

No. 2008-KA-01621-SCT.

March 17, 2011.

Certiorari from the Court of Appeals of the State of Mississippi

Supplemental Brief of the Appellee

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*1 On March 1, 2011, this Court granted Vanessa Decker's Petition for Writ of Certiorari. Pursuant to [Mississippi Rule of Appellate Procedure 17\(h\)](#), the State of Mississippi files this Supplemental Brief in support of its claim that the holding of the Court of Appeals should be affirmed.

**THIS HONORABLE COURT SHOULD AFFIRM THE COURT OF APPEALS'S
DECISION TO UPHOLD VANESSA DECKER'S CONVICTION AND SENTENCE.**

I. FACTS AND PROCEDURAL HISTORY

Vanessa Decker was convicted of **exploitation** of a vulnerable adult pursuant to [Mississippi Code Annotated §43-47-19](#) for writing checks to herself and her husband from a checking account set up for her mother, Nannie Mae Morris. Decker was initially charged with four counts of violating this statute. However, the first count was voluntarily dismissed by the State and the jury found her not guilty on two of the three remaining counts as the checks written with regard to those counts were written during a time when Decker was actually caring for her mother. The checks written with regard to the count for which Decker was convicted were written during a time when Ms. Morris was living with Decker's sister and during which Decker was providing no care whatsoever for her mother. As a result of this conviction, Decker was sentenced to a four year suspended sentence, restitution, and a fine.

Decker appealed her conviction and sentence raising the following issues: “(1) she was denied sufficient notice to prepare a defense, and (2) the statute defining **exploitation** of a vulnerable adult is vague, indefinite, and uncertain.” *Decker v. State*, 2008-KA-01621-COA, ¶2 (August 31, 2010). The Court of Appeals found no error on either issue and upheld the conviction and sentence. Decker filed a motion for rehearing on September 14, 2010 which was denied on December 14, 2010. Decker then petitioned this Court for certiorari on December 28, 2010. The Petition was *2 granted on March 1, 2011.

II. SUMMARY OF THE ARGUMENT

The Court of Appeals did not err in upholding Decker's conviction and sentence. The indictment gave Decker proper notice of the charge against her as it specifically cited to the statute which makes clear that **exploitation** of a vulnerable adult can occur with or without the vulnerable adult's consent. Furthermore, consent under this statute is a non-element in that the State did not have to prove anything with regard to consent. Thus, having the vulnerable adult's consent to use her money was not a valid defense. Additionally, [Mississippi Code Annotated §43-47-5\(i\)](#) is not unconstitutionally vague. This Court has previously upheld the constitutionality of the statute.

III. ARGUMENT

A. The indictment gave Decker proper notice of the charge against her.

On appeal, Decker argued that “she was denied sufficient notice to prepare a defense,” specifically arguing that “she was denied the constitutional right to know the specific charge against her because the jury instructions did not follow the language of the charge in the indictment.” *Decker* at ¶2 and ¶5. The indictment charged that Decker **exploited** Ms. Morris by writing checks to herself and her husband from Ms. Morris's checking account without Ms. Morris's consent and referenced [Mississippi Code Annotated §43-47-19\(1\)](#) and (2)(b).¹ *Decker* at ¶6. The jury *3 instructions stated that in order for the jury to find Decker guilty, they needed to find that the money was taken “with or without the consent of Nannie Morris.” *Decker* at ¶7. [Mississippi Code Annotated §43-47-6\(i\)](#) which defines the term “**exploitation**” as it is used in [§43-47-19](#) gives the following definition: “the illegal or improper use of a vulnerable adult or his resources for another's profit or advantage, *with or without the consent of the vulnerable adult*, and includes acts committed pursuant to a power of attorney.” (*emphasis added*). With respect to Decker's first argument, the Court of Appeals held:

Decker is correct that the jury instruction failed to follow the language of the indictment. However, the jury instruction follows the definition of **exploitation** set out in [Mississippi Code Annotated section 43-47-5\(i\)](#) (Rev. 2009). . . . The testimony implied, but did not directly state, that Decker's use of the money was for her son's benefit with her mother's consent. Regardless, the statute makes clear that any improper use of a vulnerable adult's resources for another's advantage is **exploitation**. The State is correct in its assertion that consent is a non-issue because the State did not have to prove anything with regard to consent. We find that Decker was put on notice by the terms of the statute that the charge of **exploitation** could be proven regardless of whether or not Decker's mother consented to the use of the money.

Decker at ¶¶9-11. This holding is correct for two reasons. First, the indictment's reference to the statute coupled with the description of the criminal act was sufficient to put Decker on notice of the specific charges against her. Second, “with or without consent” is a non-element in that the State did not have to prove anything with regard to consent under this statute.

1. The indictment was sufficient.

An indictment is sufficient if it includes “the seven enumerated items of Rule 7.06 and provide[s] the defendant with actual notice of the crime charged so that from a fair reading of the indictment taken as a whole the nature of the charges against the accused are clear.” *Caston v. State*, 949 So.2d 852, 856 (Miss. Ct. App. 2007). The indictment in this case met that standard. The description of the criminal act itself coupled with the reference to the statute violated clearly set forth *4 exact nature of the charges against Decker. See *Madere v. State*, 794 So.2d 200, 212 (Miss. 2001) (holding that “while a statutory citation cannot, standing alone, meet the test for a legally sufficient indictment, a citation to the statute reinforces other references within the indictment”).

2. Consent is a non-element and required no proof from the State.

“With or without the consent of the vulnerable adult” is a non-element as nothing had to be proved to establish that Decker either acted with or without her mother's consent. As noted in the Appellee's Brief before the Court of Appeals, consent in this statute is similar to consent with regard to sexual crimes where the victim is a child in the sense that the law deems a person under a certain age incapable of consenting just as the law deems a vulnerable adult incapable of consenting. For example, in *Cantrell v. State*, the defendant was convicted of violating [Mississippi Code Annotated §97-3-95\(c\)](#) (Supp. 1986) which forbade the sexual penetration of a child under the age of twelve. [507 So.2d 325](#) (Miss. 1987). The indictment in *Cantrell* charged that the defendant acted “with force;” however, the jury was instructed that they “should not consider ‘consent’ or ‘force’ to be a necessary element of the crime as charged.” *Id.* at 330. The defendant argued on appeal that the instruction clashed with the indictment. *Id.* This Court held as follows:

We hold that *the instruction properly narrowed the issue for the jury*. The state was not required to prove force under [§97-3-95\(c\)](#) (Supp. 1986) of a child under 12 which clearly was the provision under which Cantrell was indicted. Thus, the instruction only had the effect of eliminating the “with force” language from the jury's consideration. There was no indication that the jury was given a copy of the indictment, and thus any possible confusion was eliminated.

Id. (emphasis added). A similar issue regarding “consent” was addressed in *Lee v. State*, [944 So.2d 56](#) (Miss. Ct. App. 2005). In this case, the defendant was convicted of two counts of statutory rape, four counts of sexual battery, and three counts of gratification of lust. *Id.* at 59. He argued on appeal that the trial court erred in allowing the State to amend the indictment to remove the words “without *5 her consent” with regard to the sexual battery charges under [§97-3-95\(11\)\(d\)](#).² *Id.* at 61. The Court of Appeals held that:

Lack of consent is not an element of this variety of sexual battery. A child under the age of fourteen has no legal ability to consent to such an act. In this context, the language “without her consent” had no legal meaning. Its removal did not deprive Lee of a valid defense. It follows that the trial court had the power to remove the language “without her consent,” which was not an element of the offense charged and which purported to give the defendant a basis for a non-existent defense. Furthermore, in each count of the indictment, the exact code section and subsection was noted. Thus, the indictment clearly notified [the defendant] that he was charged with sexual battery as defined by [Mississippi Code Annotated Section 97-3-95\(1\)\(d\)](#) (Rev. 2000). Upon review, we find that Lee was not prejudiced by the amendment. Therefore, the trial court did not err in allowing the State to amend the indictment.

Id. In the case at hand, just as in *Lee*, “without her consent” has no legal meaning as a vulnerable adult has no legal ability to consent. Requiring “without her consent” to be in the jury instruction would have, as set forth above by this Court in *Lee*, given the Appellant “a basis for a non-existent defense.”³ This Court granted certiorari and “agreed with the Court of Appeal’s disposition of this case” holding that “our precedent establishes that ‘surplusage’ in an indictment may be removed without prejudice to the defendant.” *Lee v. State*, 944 So.2d 35, 38 (Miss. 2006).

B. Mississippi Code Annotated §43-47-5(i) is not unconstitutionally vague.

Decker also argued on appeal that “the statute defining **exploitation** of a vulnerable adult is vague, indefinite, and uncertain” because “there is no explanation of the terms ‘illegal and improper.’ ” *Decker* at ¶¶2 and 12. Mississippi Code Annotated §43-47-6(i) which defines the term “**exploitation**” as it is used in §43-47-19 gives the following definition: “the illegal or improper use *6 of a vulnerable adult or his resources for another’s profit or advantage, with or without the consent of the vulnerable adult, and includes acts committed pursuant to a power of attorney.” With respect to this argument, the Court of Appeals held:

The supreme court in *Boatner v. State*, 754 So.2d 1184, 1190 (¶17) (Miss. 2000) found that this very statute was not unconstitutionally vague.... The supreme court found: “Clearly, subsections (a), (i), and (k) of section 43-47-5 . . . not only offer guidance, but lay out plain definitions of the terms ‘abuse,’ ‘neglect,’ and ‘**exploitation**,’ so that the judge in this case had no need to, nor did he, provide his own definitions.” *Id.* “The test concerning statutory construction is whether a person of ordinary intelligence would, by reading the statute, receive fair notice of that which is required or forbidden.” *Id.* at 1189 (¶14) (citing *State v. Burnham*, 546 So.2d 690, 692 (Miss. 1989)). Decker was found to have used her mother’s money for the advantage of someone other than her mother during a time period in which she was not caring for her mother. It was not disputed that Decker’s mother was a vulnerable adult. Under the statute, Decker’s actions constituted **exploitation**. We cannot find that the statute is unconstitutionally vague.

Decker at ¶¶14-15. As the Court of Appeals noted in its holding, this Court has previously upheld the constitutionality of this statute specifically stating that the very definition complained of by Decker was a plain definition. The statute clearly makes it illegal to use a vulnerable adults money or other resources for the benefit of another. As the Court of Appeals pointed out that is exactly what the jury found that Decker did.

***7 CONCLUSION**

Accordingly, the State of Mississippi respectfully requests that this Honorable Court uphold the Court of Appeal’s opinion affirming Vanessa Decker’s conviction and sentence.

Footnotes

¹ §43-47-19 reads in pertinent part as follows:

(1) It shall be unlawful for any person to abuse, neglect, or **exploit** any vulnerable adult,

(2) . . .

(b) Any person who willfully **exploits** a vulnerable adult, where the value of the **exploitation** is less than Two Hundred Fifty Dollars (\$250.00), shall be guilty of a misdemeanor, and upon conviction thereof, shall be punished by a fine not to exceed Five Thousand Dollars (\$5,000.00) or by imprisonment not to exceed one (1) year in the county jail, or by both such fine and imprisonment; where the value of the **exploitation** is Two Hundred Fifty Dollars (\$250.00) or more, the person who **exploits** a vulnerable adult shall be guilty of a felony and upon conviction thereof, shall be punished by imprisonment in the custody of the Department of Corrections for not more than ten (10) years.

² Section 97-95(1)(d) states that “a person is guilty of sexual battery if he or she engages in sexual penetration with a child under the age of fourteen (14) years of age, if the person is twenty-four (24) or more months older than the child.

- 3 Additionally, the indictment in the case at hand, like that in *Lee*, contained a reference to the statute under which the Appellant was being charged and contained sufficient information to notify the Appellant of the charges in which she was facing.

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